



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gardner Zemke Company

File: B-234857

Date: July 20, 1989

DIGEST

Where invitation for bids (IFB) clearly informed bidders for construction contract that certain bid items (for furnishing and installing transformers) required line item prices and specific information regarding transformer losses for use in calculating evaluated prices, and IFB warned bidders that failure to provide either price or transformer loss information for these bid items would result in bid being rejected as incomplete, contracting officer properly rejected protester's bid which did not contain transformer loss information for required transformers, as protester's bid could not be evaluated under IFB's evaluation formula.

DECISION

Gardner Zemke Company protests the Bureau of Reclamation's (BOR) rejection of the bid it submitted in response to invitation for bids (IFB) No. 9-SI-32-00670/DC-7770 for construction of the Waddell Pumping-Generating Plant Switchyard, Regulatory Storage Division, Central Arizona Project. The protester alleges that the agency improperly rejected its bid as nonresponsive because the bid did not contain certain information concerning warranted kilowatt losses^{1/} as required by the IFB. Gardner Zemke also asserts that the bid of Plateau Electrical Constructors, Inc., the firm whose price was evaluated as lowest, is nonresponsive for failure to declare the proper value of nondomestic materials to be supplied for certain bid items as required by the IFB. In addition, Gardner Zemke contends that the agency improperly calculated the loss evaluation for power transformers, thereby erroneously determining that Plateau's

^{1/} "Kilowatt losses" are a measure of the efficiency of a transformer and its related equipment in specified environmental conditions.

evaluated price was lower than Gardner Zemke's evaluated price.

We deny the protest in part and dismiss it in part.

Issued on December 12, 1988, the IFB requested bids to construct a major portion of the facility. Among other things, the invitation required bidders to state prices for furnishing and installing several power transformers. The IFB stated that, in addition to comparing the total prices set forth in the bids, the agency would consider transformer losses and a 6-percent Buy American Act differential where appropriate in comparing bids. Eight bids were received by the February 22, 1989, bid opening. Plateau's bid was evaluated as lowest-priced by BOR.

By letter of March 17, Gardner Zemke filed its initial protest in our Office arguing that Plateau's bid was nonresponsive to the Buy American Act provisions of the IFB which required bids to list the cost of foreign construction materials, as well as comparable domestic construction materials, where a bid was based upon use of one or more foreign construction materials. Gardner Zemke also alleged that, if the BOR had properly evaluated transformer losses, Gardner Zemke's bid price would have been evaluated as approximately \$24,611 lower than Plateau's.

On April 5, the contracting officer rejected Gardner Zemke's bid as nonresponsive. As explained further below, the contracting officer determined that Gardner Zemke's bid did not qualify to provide foreign transformers for line items 27 and 29, and, therefore, Gardner Zemke was required to furnish domestic transformers for those line items. Because Gardner Zemke was required to furnish domestic transformers, Gardner Zemke's bid was required to, but did not, include information related to domestic transformer losses for the purpose of evaluating and comparing bids. As Gardner Zemke did not supply the required transformer losses for evaluation, the bid was considered incomplete and, therefore, ineligible for award. By letter of April 18, Gardner Zemke filed a second protest in our Office contending that the contracting officer's determination that Gardner Zemke's bid was nonresponsive was erroneous. On May 19, the contracting officer rejected Plateau's bid as nonresponsive for essentially the same reason.

The IFB stated that the Buy American Act generally requires that only domestic construction material be used in the performance of this contract. The IFB listed a number of materials that were excepted from this requirement, but the present protest does not concern any of those materials.

The IFB stated that offers based upon use of foreign construction material other than those listed as excepted could qualify for acceptance, if the government determined that use of domestic construction material would be impracticable or would unreasonably increase the cost. Accordingly, the IFB directed that any offer based upon use of one or more foreign materials other than those listed as excepted in the IFB should include data clearly demonstrating that the cost of each foreign construction material, plus 6 percent, would be less than the cost of each comparable domestic material.

Bidders intending to use foreign construction materials that were not listed as excepted were directed to complete a "Foreign and Domestic Construction Materials Cost Comparison" form that was contained in the IFB, stating: (1) the bid item for which foreign materials were to be used; (2) the cost of the foreign construction material for that bid item; and (3) the cost of comparable domestic construction material for that bid item. Based upon the information provided by the bidder, a comparison between the cost of domestic and foreign material would be made; if the cost of foreign material, plus 6 percent, was shown to be less than the cost of comparable domestic material, the offer of foreign material would qualify for acceptance for that bid item. On the other hand, where foreign material did not qualify for acceptance based upon the cost comparison, the bidder would be required to state an alternate price for comparable domestic material and to furnish domestic material for that bid item at the stated price.

Gardner Zemke's bid was rejected because of the firm's responses on bid items 27 and 29. Bid item 27 required a price to furnish and install 2 230-kilovolt, 41.25/55/68.75 MVA, 3-phase power transformers, and bid item 29 required a price to furnish a spare transformer of the same type. Gardner Zemke completed the IFB's "Foreign and Domestic Construction Materials Cost Comparison" form for these items. However, Gardner Zemke's figures showed that the cost of the foreign materials for each of these bid items, plus the 6 percent Buy American Act differential, was more than the stated cost of comparable domestic materials. Therefore, Gardner Zemke's bid did not qualify for acceptance of foreign construction materials for bid items 27 and 29.

Gardner Zemke was thus required to give alternate prices for providing domestic transformers as the firm would be required to provide domestic transformers to BOR if awarded the contract. In addition, in order that BOR could properly compare bids, including evaluation of transformer kilowatt

losses as specified in the IFB, Gardner Zemke was required to provide in its bid information concerning domestic transformer kilowatt losses. However, while Gardner Zemke's bid did contain prices for both foreign and domestic transformers, the bid included transformer kilowatt loss information only for foreign transformers but not for domestic transformers. As Gardner Zemke was required to provide domestic transformers, but had not supplied the domestic transformer losses as the IFB required, the contracting officer could not evaluate the bid in accord with the IFB's stated scheme. Therefore, the contracting officer determined that Gardner Zemke's bid was "an incomplete bid which could not be considered," and rejected the bid as nonresponsive.

Gardner Zemke does not dispute any of the above facts. However, Gardner Zemke argues that its bid should have been qualified for and evaluated on the basis of providing foreign transformers. The protester acknowledges that the cost figures it provided in the "Foreign and Domestic Construction Materials Cost Comparison" section of its bid do not clearly demonstrate that the cost of foreign transformers, plus the 6 percent Buy American Act differential, is less than the cost of comparable domestic transformers. However, Gardner Zemke asserts that the actual cost to BOR of purchasing domestic transformers will be much higher than the cost of purchasing the foreign transformers bid by Gardner Zemke due to the domestic transformer kilowatt losses.

According to the protester, the kilowatt losses attributable to the domestic transformers for which it stated an alternate price in its bid are much higher than the kilowatt losses attributable to the foreign transformers it bid. The protester charges that over the lifetime of the transformers the overall cost of the domestic transformers will be much greater than the overall cost of the foreign transformers, taking into account the much greater kilowatt losses accruing to the less efficient domestic transformers. Accordingly, Gardner Zemke believes that the contracting officer should have considered costs related to transformer losses when determining whether foreign construction materials would be qualified for acceptance.

It is a fundamental principle of federal procurement law that a solicitation must be drafted in a manner that clearly informs all offerors of the evaluation factors to be used by the agency so that all offerors are provided a common basis

for submission of offers. See Waukesha Engine Division of Dresser Industries, Inc., B-215265, June 24, 1985, 85-1 CPD ¶ 711. An agency may not consider any factor that was not clearly set forth in the solicitation as an evaluation factor, even where consideration of such factor would represent cost savings to the government. See Sargent Controls, B-224313.3, Jan. 14, 1988, 88-1 CPD ¶ 32.

Here, the IFB specifically stated that, in order for an offer of foreign materials to qualify for acceptance under the IFB's Buy American Act provisions, a bidder had to demonstrate that the cost of each foreign material, plus 6 percent, was less than the cost of each comparable domestic material. The IFB defined cost for the purpose of the Buy American Act comparison as including all delivery costs of the construction material and any applicable duty. Nowhere in the IFB was there any indication that transformer losses would be considered in comparing foreign and domestic construction material costs. Accordingly, consistent with the specific terms of the IFB, the contracting officer properly did not consider costs related to transformer losses in determining that the foreign transformers offered by Gardner Zemke did not qualify for acceptance under the IFB's Buy American Act provisions.

To the extent that Gardner Zemke is protesting that the IFB was deficient because it did not specifically state that transformer losses would be considered when qualifying foreign transformers for acceptance, the protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988), protests alleging improprieties in an IFB which are apparent prior to bid opening must be filed prior to bid opening. Here, it was clear from the Buy American Act provisions of the IFB that transformer losses were not going to be considered in qualifying foreign construction materials. Accordingly, as Gardner Zemke protested this issue after the February 22, 1989, bid opening, the protest on this ground is untimely.

Once Gardner Zemke failed to qualify its foreign transformers for acceptance, Gardner Zemke was required to state alternate prices and information concerning transformer losses for domestic transformers. The IFB made it clear that bid prices, transformer losses, and Buy American Act differentials would all be considered by the agency when comparing and evaluating bids for award. The IFB specifically set forth a formula stating how transformer losses would be used to calculate evaluated prices. Most significantly, the IFB warned that a bid that did not furnish appropriate values relating to transformer kilowatt losses

would be considered incomplete and that such an incomplete bid would not be considered for award.

Gardner Zemke's bid did provide alternate prices for domestic transformers, but did not provide the domestic transformer loss information that was required in order for the contracting agency to determine evaluated bid prices. The only information Gardner Zemke's bid provided regarding domestic transformer losses was at the bottom of the page containing domestic transformer prices, whereupon Gardner Zemke had written:

"NOTE: Transformer losses for domestic transformers are much higher than non-domestic quoted in proposal."

The IFB's evaluation formula was designed to allow the BOR to determine the total cost to the government of accepting a particular bid. Toward this end, the IFB stated that the bids would be evaluated based not only upon the stated bid prices, but also upon the basis of the transformer loss evaluation formula and Buy American Act differentials, where appropriate. The IFB specifically warned bidders that any bid that did not contain the required transformer loss information would be rejected as incomplete. It should have been clear to all bidders that the agency needed to have very specific information on the losses associated with the transformers that were going to be provided, otherwise the contracting officer would not be able to calculate the expected cost to the government of each bid for comparison purposes. That Gardner Zemke knew that BOR required very specific information on transformer losses is evident from the fact that Gardner Zemke submitted detailed information related to its foreign transformers.

As Gardner Zemke's bid failed to give information that was critical to the agency's evaluation of the costs associated with domestic transformer losses, Gardner Zemke's bid could not properly be evaluated under the IFB's award scheme. Because the IFB warned bidders that failure to provide this critical information would result in a bid being considered incomplete, we find that the contracting officer properly rejected Gardner Zemke's bid as nonresponsive. See Paulsen Construction Co., B-231393, Sept. 13, 1988, 88-2 CPD ¶ 230, aff'd, B-231393.2, Jan. 24, 1989, 89-1 CPD ¶ 63. Accordingly, the protest is denied on this issue.

Finally, we will not consider the protester's arguments that Plateau's bid was nonresponsive and that the contracting agency improperly evaluated transformer losses, resulting in Plateau's bid being evaluated as lower in price than the

protester's bid. In view of OR's determination that Plateau's bid was in fact no responsive and our finding that the contracting officer properly rejected Gardner Zemke's bid as well, neither firm is eligible for award under this IFB in any event. Therefore, these issues are dismissed. See Gel Systems, Inc., B-233286, Jan. 10, 1989, 89-1 CPD ¶ 26.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel